THE RIGHT OF PRIVACY

During a period of about twenty years American law courts have been discussing protection of the right of privacy. Some tribunals have utterly refused to recognize any legal right in the individual to be let alone; others have just as emphatically asserted and effectuated it. Such advances as have been made are tentative and unsystematic. Nevertheless, the weight of argument is in favor of juridical authority and it is believed that eventually, so far as legal machinery may be made effective, personal privacy will be guarded up to the point where legitimate rights of society override it.

If the law has seemed sluggish in taking cognizance of an important feature of civilized security, it should be remembered that ethical sentiment must precede positive law and that even at present the ethics of privacy are far from exact formulation and farther still from being lived up to. A gentleman can ill afford to be found out in violating a confidence he has courted or accepted. Yet the average club-gossip salves his conscience by merely "not mentioning names", while relating a tale the very realistic piquancy of which identifies everybody concerned.

Literary artists have too often been guilty of similar infraction of the ethics of privacy without any qualms whatever. Mr. Henry James, after saying that putting people into books is inevitable, that it is "what the novelist lives upon", makes the saving reservation: "The question in the matter is the question of delicacy, for according to that delicacy the painter conjures away recognition or insists upon it." Mr. James is speaking especially of Alphonse Daudet, who more than most novelists was dependent upon the living model for the impression of real flesh and blood in his characters. As to one of his most striking bodily transfers from life into a book, the Duc de Morny, his friend and benefactor, into the Duc de Mora, of *Le Nabab*, Mr. James remarks that the picture is one the real duke "would not be displeased to have inspired." A famous English novelist excused the caricaturing of two of his friends in forms they could not fail to resent, by remarking that his own father had

fared no better. It is not surprising that when this writer essayed gentlemen he drew Verisophts and Veneerings, or such a wooden image as Sir Peter Dedlock. The productiveness of genius is of more importance than convention or scrupulous delicacy, and only an aggravated prig would cavil at the fame of Charles Dickens and Richard Wagner because one was not a man of high breeding and the other was impossible for either society or friendship. Mr. James's canon, however, is still the rule which ought to be followed by writers of fiction great and small.

Poets, as well as novelists, live by putting people into books, and in the lyric, or dramatic lyric, as in the novel, the model may serve merely to vivify abstractions or the poet may be frankly personal. Robert Browning's "Any Wife to Any Husband" typically expresses the keynote of perhaps the majority of women's lives. But in "One Word More", in which, without reserve, he lays bare his own and another's soul, he contributed the love-poem which, in the judgment of the present writer at least, English literature could least afford to lose. Here, as in Daudet's reincarnation of the Duc de Morny, as in Thackeray's close study of his stepfather, Colonel Carmichael, in Colonel Newcomb, it may be said that the picture is one that the original could scarcely have been displeased to inspire. It would seem, however, that in work of this kind the poet or novelist should, if the original be living, not neglect to ask consent for the breach of sacred privacy.

That somewhat saturnine lay-preacher but withal agreeable rhapsodist, Mr. Arthur C. Benson, uses the living text constantly. His character sketches are always graphic; they purport to be founded on intimacy of acquaintance or friendship and his butts and half-gods have the same verisimilitude as his enviable exemplars. Indeed, Mr. Benson's quick eye for concrete humanity, more than anything else, makes him readable and gives him a certain authority as a critic of life. If he has successfully observed Mr. James's canon of delicacy, he possesses an unusual gift of recasting personalities in imaginative forms.

A very important feature of the ethics, as well as the law, of

privacy is the distinction between public and private characters, or rather the classification of public and private capacities. In the development of the law no single element has incited so much discussion and controversy. It has been contended by counsel and by some courts that a person in becoming a public character surrenders all rights of inviolate personality. It is, however, impossible to draw an abstract line between public and private characters. A person of ordinary ability and life may by an act of impulsive heroism become a proper subject of public comment. His single achievement may, indeed, have been so unusual and significant as to gain for him a place in history. *Pro tanto*, therefore, he becomes a public character both for the day and the future. On the other hand, it would be manifestly unjust if an eminent statesman could not restrain the use of his portrait as the trademark of a disgusting quack nostrum.

The true view is that, while more details of personal characteristics and habits are of legitimate public interest in an official or a candidate for office, than in the average citizen, a man dedicates his privacy only in so far as his public career requires it. Clearly, the most illustrious author of the day is entitled in his house, which is his castle, to immunity from the camera in the hands, not of the open enemy, but of spies.

The ethics of hospitality, of course, superadd to the obligation of delicacy attaching to ordinary privacy. The account given by Kinglake, in *Eothen*, of his visit to Lady Hester Stanhope is a commendable example of the literature of direct personalities. It was not published until after her death and, although there is an unavoidable undercurrent of humor in the description of his hostess's beliefs and pretensions, her personal appearance and surroundings, there is never a note of contemptuousness. He pointedly respects her ban of secrecy as to one topic which he says would have been of great general interest. He was, indeed, a private guest, a former family friendship being the reason of his invitation. But the life of the oracle and autocrat of the desert can hardly be said to have had any essentially private side. Her whole career had been a public pose; she arrogated for her personality an importance tinged with supernaturalism. She was unquestionably a permissible subject

for public portraiture and this one evinces the loyalty and reserve incumbent upon one who has eaten another's salt.

During the past few years several books have been written by American women depicting hospitalities enjoyed in circles of high distinction in Europe. As a rule they manifest well-bred conscientiousness in the manner of saying things as well as in the selection of things to record. Especially in the papers of Mrs. Mary King Waddington, good taste and tact have been as unfailing as felicity of style. Certain social functions, such as state banquets or court balls, are practically as public in character as a coronation or the laying of a corner-stone. Even here, however, a guest should never forget that he had been guest; and one accepting quasi-public hospitality, such as entertainment at a house party of an important personage, should observe, as Mrs. Waddington unswervingly has done, a *nil nisi bonum* rule.

Contrasts with the spirit shown by Kinglake and Mrs. Waddington are, however, unfortunately not uncommon. Some years ago an eminent Englishman was entertained at dinner at the home of a very wealthy American. The guest wrote a private letter contemptuous of his host and portraying the establishment as one of Sybaritic vulgarity. The writer himself did not sin, but after his death a relative and biographer was so indiscreet as to include the communication in a "Life and Letters." Again, an eminent American in his autobiography gives an account of a dinner party at which he was a guest at the home of a famous Englishman, and he tells without reserve how the host indulged very freely in wine and in conduct little short of clownish.

No reproach attaches to laying bare the domestic life of our remote ancestor, Cedric, the Saxon, or even that of our forbears of the generation presented in the introductory chapter of Macaulay's history. But children of both the dinner hosts alluded to are still alive, and such breaches of the ethics of hospitality and privacy go far to explain why the law of privacy dates from the year 1890, when Messrs. Samuel D. Warren and Louis D. Brandeis published in the *Harvard Law Review* for December of that year an article on "The Right of Privacy", which has

been quoted in practically every judicial opinion on the subject and has been far and away the most influential factor in developing the new field of jurisprudence. The authors first sketch the growth of the domain of legal protection with the broadening of the intellectual and spiritual wants of civilized mankind. A stage has now been reached when not only rights of the physical person, of property, and of reputation must be guarded, but also immunity should be afforded against the use of one's personality for private gain by others or to feed a prurient curiosity. The writers ingeniously suggest as the theoretical basis analogies, not from the law of defamation, but from that of literary property.

Outside of copyright, which is a statutory creation ensuring benefits to be derived from the publication of works of literature or art, it has always been the common law that a person might continue to own and control his intellectual production, provided he did *not* publish it. With publication by the author's consent his common-law title ends and, if he has secured a copyright, his property thereafter is such as the congressional or parliamentary act prescribes. If a person write a letter to a friend, the former owns the verbal text he has composed. He may publish it and may restrain the recipient from its publication. The recipient, on the other hand, becomes the owner of the physical medium, that is the paper with the writing on it; if it be not of inherently confidential nature, it may be exhibited to others and, according to a recent decision by the Supreme Judicial Court of Masschusetts, may be sold to autograph collectors. The right of an author to control the text of unpublished literary productions offered a germinal analogue for the law of privacy, and incidental dicta in certain well-known English cases cited by Messrs. Warren and Brandeis emphasize the abuses to flow from indiscriminate liberty of publication. The writers further refer to a line of cases in which the publication of such productions as oral lectures is enjoined, because it would amount to a breach of confidence. These decisions are approximately and helpfully, though by no means completely, in point. A lecture is not a confidential production as a private letter may be. The breach is of a confidence implied from being permitted to profit

by another's literary property. Publication by an auditor would be a breach really of an ethical, nay a business, obligation.

Since the publication of the *Harvard Law Review* article several attempts have been made to invoke a law of privacy, resulting in a serious judicial controversy upon whether any such right may be recognized. Two of the most notorious cases arose in New York. In 1893 an association of ladies inaugurated a project to exhibit at the Columbian Exposition at Chicago a bust of the late Mrs. Mary Hamilton Morris Schuyler, selecting her as a type of "Woman as the Philanthropist" (Schuyler *v.* Curtis, 147 N. Y. 334). Legal steps were taken on behalf of her nieces and nephews, the nearest surviving relatives, for an injunction. The litigation succeeded in the lower courts so as actually to prevent the exhibition of the statue at the World's Fair. The highest court, however, later reversed this action on the ground that any right of privacy that might have existed died with the person and could not be invoked merely to avert publicity that would be distasteful to the family. The result of this decision was certainly right. The lower courts proceeded on the fatuous assumption that because Mrs. Schuyler had not been an authoress, an artist, an actress, or a candidate for office, she was not a public character and therefore that, living or dead, her privacy might be guarded. In this view public commemoration might have been forbidden of the late George Peabody, the late Peter Cooper, and of many others whose careers were sincerely regarded as human ideals. Public authority, acting through the criminal law, may be exercised to punish defamation of the memory of the dead. The Schuyler suit in a civil court was in no real sense an assertion of a lady's modesty but rather of the supersensibility of her kinsfolk. It is significant that the opinion of the Court of Appeals contained many incidental remarks favorable to the protection of privacy in proper cases.

In the later case of Roberson *v.* Rochester Folding Box Co. (171 N. Y. 538), however, after a change in the personnel of the Bench, these intimations were recanted. The substance of this decision may well be given in the language of the official reporter, as it has much of the *naïveté* of the syllabi

of Boccaccio's tales, an unconscious humor along with its brutality:—

> "An injunction cannot be granted to restrain the unauthorized publication and distribution of lithographic prints, or copies, of a photograph of a young woman as part of an advertisement of a legitimate manufactured article, where there is no allegation that the picture is libelous in any respect, but, on the contrary, the gravamen of the complaint is that the likeness is so good that it is easily recognized and that it has been and is used to attract attention to the advertisement upon which it is placed, although the publication has caused her great mental and physical distress, necessitating the employment and attendance of a physician."

We have said that the former views were recanted, but this was by a bare majority of the Court of Appeals, three judges out of seven vigorously dissenting and upholding the unanimous view of the inferior court. The gist of the reasoning of the majority is that a "distinction between public and private characters cannot possibly be drawn" (which is undoubtedly true); that no actionable right of privacy exists; that some liberty of publication concerning individuals must be recognized; and that it is not feasible for courts, even of equity, to draw "arbitrary distinctions". As far as the particular case was concerned, it would have been sufficient to recognize a property right in one's own physiognomy which was being pirated as an advertisement for another's profit. Equity is indeed impotent if it cannot take cognizance of an affair of such pecuniary tangibleness. The able dissenting opinion of Judge John Clinton Gray, of the New York Court of Appeals, formulated enduring argument in favor of legal rights of privacy. He recognized the ordinary property incidents in a case where an individual was making money out of another's personal attributes, and he went further, adopting the germinal theory of Messrs. Warren and Brandeis:—

> "The right to grant the injunction does not depend upon the existence of property, which one has in some contractural form. It depends upon the existence of property in any right which belongs to a person. . . . .
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> "Property is not, necessarily, the thing itself, which is

> owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the common law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right. It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind."

The decision provoked wide discussion and much protest not only by the secular journals but in professional circles. Quite unprecedentedly one of the judges constituting the majority of the Court of Appeals contributed an article of explanation and justification to a legal periodical. There was a general feeling that a serious wrong had gone unrighted, and promptly the Legislature of New York passed a statute to cover the specific case of using for trade purposes the name or portrait of a living person without his consent. This infraction of what the Legislature itself terms a "Right of Privacy" was made criminally punishable, and, further, an individual was granted the right to sue not only for an injunction but for damages, which may even include "smart money".

Two years after the New York decision in the Roberson case a similar controversy came before the Supreme Court of Georgia in Pavesich *v.* New England Life Insurance Co. (122 Ga. 190), a case also involving the use of an individual's portrait for business advertising, and the latter tribunal unanimously granted the injured person redress and formulated very comprehensive rights of privacy, approving the reasoning of Judge Gray's dissenting opinion in New York. Other courts also have passed upon the question, with conflicting results. Without attempting to review the various decisions a prognosis of the effectuation of the ethics of privacy by law may be attempted.

First—It may be asserted with confidence, that, either by statute or through inherent judicial authority, relief will generally

be afforded against the use of an individual's name or picture, or his alleged utterances, to tout another's business enterprise. Here the ordinary attributes of property are so patent that no court should require legislative aid.

Second — A recent Massachusetts case shows a disposition to restrain disclosure of matters of intrinsic privacy. In Baker *v.* Libbie, in the Supreme Judicial Court (97 N. E. 109) it was sought by the executor of the late Mary Baker G. Eddy, the founder of "Christian Science", to restrain an auctioneer of manuscripts from printing for advertising purposes and from selling autograph letters sent by her to a cousin and treating of domestic affairs. While conceding the right to restrain publication or multiplication of copies, it was decided that the physical title to the letters was in the addressee, or her assignee, who might sell them, like ordinary articles of property. Before reaching this conclusion Chief Justice Rugg refers to the famous *Harvard Law Review* article and uses this pregnant language :—

> "The very nature of the correspondence may be such as to set the seal of secrecy upon its contents. Letters of extreme affection and other fiduciary communications may come within this class. There may be also a confidential relation existing between the parties, out of which would arise an implied prohibition against any use of the letters and a breach of such trust might be restrained in equity. . . . This case does not involve personal feelings or what has been termed the right of privacy. The author was deceased. Moreover, there appears to be nothing about these letters, knowledge of which by strangers would violate even delicate feelings."

These remarks cannot be regarded as *obiter* and therefore, negligible as authority. They are part of the essential reasoning; the marketability of the letters is made to depend upon the "absence of some special limitation imposed either by the subject-matter of the letter or the circumstances under which it is sent." Inferentially this would countenance legal protection for what is perhaps the most sacred and widely applicable dictate of the ethics of privacy. Contained in a unanimous opinion of one of the leading and most influential State tribunals the

significance of the language is very great. It would seem, indeed, to commit that court to recognition of legal rights of privacy.

In the Schuyler statue case, the New York Court of Appeals said that the right of privacy which any person has during life dies with him. According to a familiar rule, however, the broad statements of a judicial opinion must be interpreted in view of the particular facts involved. The New York court suggested, without actually deciding, that as Mrs. Schuyler had been a shy and modest woman she might have been permitted to forbid the erection of a statue during her life, but held that her surviving relatives would not be suffered to veto that particular form of infraction of privacy after her death. The Massachusetts court was discussing the disclosure of essentially personal and familiar matters, which presents an entirely different case. Chief Justice Rugg remarks that Mrs. Eddy was dead, but this was not necessarily indicative that real privacy might never be protected after death. It may have been merely an additional equitable ground why there should be no interference in the present controversy. The contents of the letters were entirely commonplace, and, especially as their author had "passed on", there was no reason why their value as merchantable autographs should be destroyed.

Cases might arise in which it would be outrageous if confidence could be violated after death from motives of pecuniary gain or pure wantonness. In the decisions of the New York Supreme Court in the Schuyler statue case, which were reversed by the Court of Appeals, the question of the parties to the litigation was not treated as a serious obstacle. The broad ground was taken that a wrong existed and that it was incumbent upon a court of equity to grant some remedy. Accordingly, the relatives of the deceased, albeit not representative of her rights of property, were treated as entitled to sue. Although the question is by no means free from difficulty and doubt, it is not improbaable that many courts would assume a similar attitude, if occasion arose. It has long been the custom of courts to entertain suits by mere "next friends", who have no personal interest in the controversy, in behalf of infants, insane persons, or others who are

non sui juris. Moreover, a right of action is now recognized on behalf of a husband or wife or children for an unauthorized autopsy, or any other form of mutilation or indignity to the remains of the dead. An analogy from these precedents, both as to procedure and substantive law, in order to protect the memory of the dead from moral outrage, would be no more strained than is the analogy from the law of literary property upon which Messrs. Warren and Brandeis based the law of privacy of the living.

So far there have been considered only infractions of privacy for which relief may be sought through the equitable remedy of injunction. In his dissenting opinion in the Roberson case Judge Gray quotes a dictum of Sir Henry Maine that equity is an agency "by which law is brought into harmony with society" and shows that "the peculiar preventive power of a court of equity" is available for effectuating the right of privacy. Such a court, sitting without a jury and with very wide discretionary functions, is the more appropriate tribunal to pass upon questions of essential privacy, such as the discrimination between public and private capacities, between ordinary communications and confidential correspondence. Furthermore, equity is capable of granting substantially complete redress in the average case through its authority to award past damages as incidental to an injunction.

While, therefore, the principal brunt will rest upon courts of equity there is one form of personal outrage for which the only remedy can be in a court of law sitting with a jury. In Hillman *v.* Star Publishing Co., in the Supreme Court of Washington (64 Wash. 691), a young woman sued a newspaper for damages for having published her photograph to attract attention to an article stating that her father was charged with crime and would be arrested. The force of "yellow iniquity" could scarcely go farther and yet the Washington court, following the New York court in the Roberson case, pronounced itself impotent and dismissed the suit. Like the Roberson decision, this Washington decision has attracted considerable adverse comment in legal periodicals. The opinion is meagre as well as shortsighted and inconclusive as far as it goes. For example, it is suggesed that a statute be passed "so framed that in the

future the names of the innocent and unoffending, as well as their likenesses, shall not be linked with those whose relations to the public have made them and their reputations, in a sense, the common property of men."

It has already been shown that it is impossible to draw an abstract line been public and private characters; a statute so aimed would be an abortive and futile piece of legislation. It is quite easy, if a court declines to act on its own initiative, to prepare an act prohibiting invasion of privacy for another's business purposes, as was done in New York, but it is precisely in cases of absolute privacy that no hard and fast rule is feasible. The only form of statute that could be of utility would be one absolutely forbidding the publication of a living person's picture without his consent. Although in the great majority of instances of proper publication the consent would be readily procurable, the objection is that such a law would abrogate the symbolical or figurative use of a person's portrait for political caricature or to point social morals. This feature has been for many years all over the world one of the most potent of journalistic weapons, and popular sentiment would probably deem the continuance of its legitimate use more important than the supression of individual hardships of publicity. For the abuse of personal caricature a remedy now exists under the law of defamation and a similar remedy should be extended for the abuse of publication of portraits without humorous or didactic suggestion under the law of privacy.

This would not curtail the proper freedom of the press. The physiognomy of a candidate for office is an important ob-object of scrutiny as it betokens character and it would not be an unjustifiable invasion of privacy to publish his picture. It is also proper to publish an account of an act of heroism by a formerly obscure person or even of his calamity in a street accident. Pictorial illustration of such a 'story' is not necessarily objectionable. If in connection with a newspaper account of a public ball or similar social function to which, according to custom, reporters were admitted, the picture of a woman in the costume she wore were given, the benefit of any doubt should be resolved in favor of journalistic liberty.

The test in any case is whether under all the circumstances the publication of a person's picture was legitimate because of his participation in some form of public life or some event of public importance or popular interest. Instances such as that of the insertion of Miss Hillman's picture could rarely be reached through an injunction, because notice of intention is not given in advance and the publication is not repeated. The decision of the Washington court stultified the adage of which lawyers are perhaps most proud, that there can be no wrong without a remedy, and the pity of it is that it would have been entirely feasible for a court of law to take cognizance.

If a candidate for office be so foolish as to sue for the exhibition of his portrait, the court on its own responsibility should dismiss the proceeding because, according to his own showing, he is a public character. On the other hand, in Miss Hillman's case, the court should have told the jury that she had been legally wronged and that the only question for them was the amount of damages. Obviously she was not a public character and was not concerned in any event of public importance or interest merely because she was her father's daughter. In doubtful cases the question whether a person's career or particular actions have justly withdrawn the veil of seclusion may itself be submitted to the jury, along with the assessment of damages, which, if granted at all, may range all the way from nominal damages to "smart money."

The procedure suggested is analogous to the administration of the law of negligence, and the problem of privacy which a jury might have to pass on is no more abstract or speculative than is the proposition of negligence referred to a jury in an ordinary street railway accident suit.

Nor would this new development of the law lead to an overwhelming flood of litigation. The American people, differing from the English people, are indulgent even toward libel. It is probable that every edition of any great American daily newspaper contains several pieces of suable defamation for only a very small proportion of which suits are ever brought. With regard to mere publicity the attitude is even more liberal. Mr. E. L. Godkin has pointedly remarked: "To be widely known

for some reason or other, or for any reason, is the one distinction which seems within every man's reach, and the desire for it is sufficiently widely diffused not only to diminish popular sympathy with people who live in the shade of private life but to some extent to make this particular state of mind somewhat incomprehensible." The average person likes to see his picture in a newswaper upon any pretext, and even if occasional suits were commenced by persons supersensitive to publicity the jury would be unable to agree in perceiving damage. It would be a safeguard, however, to have a right of action for damages for invasion of privacy so established as to be available in meritorious cases, such as that of Miss Hillman, just as it is always a deterrent against excesses that actionability for defamation exists, although resorted to with comparative infrequency.

The tendency seems to be setting toward legal protection against any form of indignity that can be reached by injunction. And it is the opinion of the present writer that even for single publications the courts in time will countenance a recovery of damages, including "smart money", if the circumstances show no plausible justification but merely a purpose to profit through an innocent person's anguish.

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